84-80

No. .....

In The

Supreme Court of the United States

October Term 1983

VIRGINIA T. HANZLIK,

Petitioner,

vs.

FREDERICK F. PAUSTIAN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

PETITION FOR A WRIT OF CERTIORARI

*David L. Herzog
1400 First National Center
Omaha, NE 68102
(402) 341-5311

Jon B. Abbott
Suite 410 Keeline Building
619 South 17th Street
Omaha, Nebraska 68102
(402) 346-0550

Attorney for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

11 RP

QUESTIONS OF LAW PRESENTED FOR REVIEW

A) Whether a decision of the court of last resort of any state is a law within the meaning and prohibition of the Fourteenth (14th) Amendment to the Constitution of the United States.

B) Whether a decision of such court, by declaring a matter of undisputed evidence to be competent, for the drawing of a favorable inference, for one party and incompetent for the other party, for any purpose; violates the prohibitions against the abridgement of the privileges and immunities of U.S. citizens, or deprives them of due process or equal protection of the laws.

C) Whether the court of last resort of any state may grant summary judgment grounded on evidence it simultaneously declares incompetent *idem per idem,* without violating the rights, privileges and immunities of the unsuccessful party, guaranteed by the Fourteenth (14th) Amendment to the Constitution of the United States.

D) Whether a palpably inequitable decision of summary judgment by a court of last resort is a denial of the right to petition the "Government" within the meaning of the First Amendment to the Constitution of the United States.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

AUTHORITIES CITED

No. .....

In The

Supreme Court of the United States

October Term 1983

VIRGINIA T. HANZLIK,

Petitioner,

vs.

FREDERICK F. PAUSTIAN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

PETITION FOR A WRIT OF CERTIORARI

CITATION OF THE REPORTED OPINION WHICH IS SOUGHT TO BE REVIEWED

The opinion of the Supreme Court of the State of Nebraska, which by this petition is sought to be reviewed is reported as: *Hanzlik v. Paustian;* and reported at:

216 Neb. 575, 344 NW2d 649.

The judgment of the Supreme Court of the State of Nebraska was dated and entered on February 24, 1984; and the date and entry of the order denying rehearing was April 11, 1984.

JURISDICTIONAL STATEMENT

The granting of the writ of certiorari to the Supreme Court of the State of Nebraska, is being sought pursuant to RSC 17.1(c) and 28 USC 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions which this case on petition involves are:

A) "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Fourteenth (14th) Amendment to the Constitution of the United States,* Sec. 1.

B) "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." *First Amendment to the Constitution of the United States.*

C) "*Rule 701. Opinion testimony by lay witnesses.* If the witness is not testifying as an expert, his testimony in the form of opinion or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." *Reissue Revised Statutes of Nebraska, 1943,* Sec. 27-701.

STATEMENT OF THE CASE

The action in question is one of alleged medical malpractice, wherein plaintiff suffered permanent disfigurement of body as a result of an avoidable open chest surgical procedure to save her life which was imminently threatened by infection resulting from a ruptured esophagus that had received no treatment for at least four days prior to surgery, and was, on the contrary, subjected to continued and increased dilation by the defendant doctor, contrary to standards of locally accepted medical procedure as admitted by the defendant doctor in sworn deposition and affidavit.

On appeal to the Supreme Court of Nebraska for an order granting defendant a summary judgment, the crucial evidence was an affidavit by plaintiff's counsel that summarized pertinent evidence and demonstrated the inferences or opinions available from the undisputed record. That affidavit had been admitted in the trial court without objection and remained unanswered either by the defendant or his counsel throughout the hearings below or on appeal, either orally or in defendant's counsel's brief. The affidavit stated: ". . . the common medical abbreviations for 'with', 'without' and 'no' are: $\overline{c}$ (*cum*), $\overline{s}$ (*sans*) *and no.* That the local common medical abbreviation for degree is 'o'. That the notation $\overline{o}$ is the notation degree (o) with a vinculum (-) superimposed (a common math/science abbreviation) indicating a bond or inseparable connection." All of the foregoing, except the combination of 'o' and (-) appeared in the glossary of "Standard Ab-

breviations and Symbols" that was also received as evidence without objection or contradiction by the defendant. The glossary was patently a medical one. In addition to the glossary, plaintiff's affidavit quoted the pertinent daily medical hospital charts of the plaintiff, which were either signed or approved by signature of the defendant.

The defendant had testified by deposition that dilation procedures would be immediately terminated on evidence of complete perforation of plaintiff's esophagus. Further, he testified that a "distinctive sign" of perforation was subcutaneous emphysema. This indicated a complete as opposed to a confined perforation, which did not involve the entire wall of the esophagus.

On *August 22,* 1974, it was noted of record. "$\overline{o}$ subcut. emphysema".

The Nebraska Supreme Court in its opinion at p. 651 (NW2d), made the following observation: "However, an esophagram study, a barium x-ray to determine any possible disruption of the integrity of the esophageal wall, was carried out on *August 23,* following dilation. This indicated a mucosal irregularity as of a *superficial* tear, but disclosed *no evidence* of any compromise of the integrity of the wall of the esophagus." (emphasis supplied)

That same report, however, in fact noted: "Esophagram → o shown perforation."

Thus the Nebraska court either draws a contrary or contradictory conclusion with that of the plaintiff's attorney's affidavit, ignoring the evidence of the 22nd—the day before.

But that court then declared: "statements in affidavits as to opinion, belief, or conclusions of law are of no effect. The same is true of summaries of facts or arguments . . . *which would be inadmissable* in evidence." The court then went on to declare plaintiff's evidence as incompetent, ignoring the rules of evidence pertaining to evidence of lay witnesses, as provided by legislative enactment; and granted summary judgment to the doctor.

———o———

MANNER AND METHOD OF RAISING THE FEDERAL QUESTIONS

The federal questions sought to be reviewed were first raised in plaintiff's Motion and Brief for Rehearing, at p. 4, as Proposition of Law no. X. The First Amendment was quoted in pertinent part, as hereinbefore, and the Fourteenth Amendment was quoted verbatim. Both were argued briefly, as follows, at p. 13 of the Motion:

> "Granting the Defendant an inference that does not exist by misinterpreting medical evidence (as opposed to drawing legitimate inferences) based on evidence competent for the court's purposes but incompetent ('source of glossary unknown') for the litigants' purposes; and denying Plaintiff any and all reasonable probative value of the undisputed record, glossary, and admission of the Defendant-Expert: is an abuse of process and a denial of basic right and equality to this Plaintiff, contrary to the clear and express provisions of the Constitution of the United States. . . ."

The Nebraska Supreme Court, without opinion or comment, overruled the motion for rehearing by journal

entry on the 11th day of April, 1984: "Motion of appellant for rehearing overruled."

ARGUMENT

A writ of certiorari to the Supreme Court of the State of Nebraska should be granted for the reasons that (a) the extension of citizens' rights and the prohibition of their abridgement to include actions taken by the several states, cannot have been meant to be applied to anything less than the whole of state government, including the courts; and (b) to deny a litigant by a palpably inequitable summary judgment the right to present a genuine issue of fact to the jury, is a denial and an abridgement of the right to petition 'the Government' for a redress of grievances.

It cannot reasonably be said that "the Government", whether of the United States or of any of the several states, includes this or that—but not the courts.

CONCLUSION

To fail to find that the Fourteenth (14th) Amendment extends to decisions of the state courts of last resort, and which are palpably inequitable; or that the provisions of the First Amendment through the application of the Fourteenth (14th) also extend to the same degree; is to fail to

give critical and necessary admonition to offending lower courts, of their duty and oath of office and the sanctity of the most basic and primary principle of law of our federal Republic: Equal Justice Before The Law.

Respectfully submitted,

*David L. Herzog
1400 First National Center
Omaha, NE 68102
(402) 341-5311

Jon B. Abbott
Suite 410 Keeline Building
619 South 17th Street
Omaha, Nebraska 68102
(402) 346-0550

Attorney for Petitioner

*Counsel of Record

84-80

No. .....

In The

Supreme Court of the United States

October Term 1983

VIRGINIA T. HANZLIK,

Petitioner,

vs.

FREDERICK F. PAUSTIAN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

*David L. Herzog
1400 First National Center
Omaha, Nebraska 68102
(402) 341-5311

Jon B. Abbott
Suite 410 Keeline Building
619 South 17th Street
Omaha, Nebraska 68102
(402) 346-0550

Attorney for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

8pp

85 SCJ 575
Advance Sheets
HANZLIK v. PAUSTIAN
Cite as 216 Neb. 575

VIRGINIA T. HANZLIK, APPELLANT, *v.* FREDERICK F. PAUSTIAN, APPELLEE.
— N.W.2d —

Filed February 24, 1984. No. 83-295.

1. **Summary Judgment: Affidavits.** In a summary judgment proceeding, affidavits of a lay witness attempting to interpret medical testimony and to arrive at conclusions as to the possible negligence of a physician and surgeon generally are insufficient to meet the burden of a party refuting a prima facie showing of no negligence by the movant.
2. ——: ——. An affidavit opposing the rendition of a summary judgment, to be effective, must be made on personal knowledge, must set forth such facts as would be admissible in evidence in detail and with precision, and must show affirmatively that the affiant is competent to testify to the matters stated therein.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Jon B. Abbott, for appellant.

Thomas J. Shomaker of Sodoro, Daly & Sodoro, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

HASTINGS, J.

The plaintiff has appealed an order of the district court granting the defendant's motion for summary judgment.

This case appears here for the second time. The previous case, one involving alleged medical malpractice, appears under the same title at 211 Neb. 322, 318 N.W.2d

712 (1982), wherein the factual background is set forth. We reversed the granting of defendant's motion for summary judgment.

By way of review we would note that in the previous case we held that whether a specific manner of treatment or exercise of skill by a physician demonstrates a lack of skill or knowledge, or a failure to exercise reasonable care, is a matter that must usually be proved by expert testimony. We further pointed out that in a case such as this, where the (p. 576) defendant is the moving party, such party must make a prima facie showing of the absence of negligence before the burden of producing evidence shifted to the plaintiff.

In that earlier case we determined that the defendant, Dr. Paustian, in his deposition explained the surgical procedures followed by him and detailed the possible consequences which might be expected therefrom, but concluded that "nowhere do we find any evidence that such procedures met the accepted standards of reasonable medical care." *Id.* at 327, 318 N.W.2d at 716.

On remand to the district court the defendant again filed a motion for summary judgment, supported by his affidavit that "he followed the generally accepted and recognized standard of care or skill of the community or similar communities in the use of the dilitation [sic] procedure." That evidence satisfied our requirement that the moving party must make a prima facie showing of the absence of negligence. To meet her burden of producing evidence of negligence on the part of the defendant as referred to above, the plaintiff submitted the affidavit of her trial attorney.

As recited in her brief, that portion of the affidavit which the plaintiff argues establishes evidence of negligence on the part of the defendant refers to two entries made by the defendant in the "Doctor's Orders and Progress Notes" taken from the hospital records. A portion of the entries made on August 22, 1974, include "$\overline{o}$ subcut. emphysema. A-1) Mucosal tear $\overline{s}$ evidence infection." In his affidavit plaintiff's counsel interprets those entries as follows: "$\overline{o}$ (some degree) subcut(aneous) emphysema. A-1) Mucosal tear $\overline{s}$ (without/or some) evidence infection." However, the glossary of abbreviations and symbols, the source of which is not shown, attached to the affidavit reveals that the symbol $\overline{s}$ means "without."

Counsel then argues that the defendant had testified in his deposition that the dilation procedure (p. 577) would be terminated upon there appearing evidence of a rupture of the esophagus and that a rupture is conclusively evident upon finding evidence of subcutaneous emphysema.

The deposition testimony alleged to support the conclusion that the dilation procedure would be terminated upon there appearing evidence of a rupture of the esophagus may be summarized as follows: The defendant testified that, generally speaking, dilation procedures are terminated if there is concern about a rupture, even though it may be only on a temporary basis. Serial blood counts and X-rays are then obtained.

There is no indication in the records that these latter procedures were carried out on August 22 or before the next dilation, which was accomplished on August 23. However, an esophagram study, a barium X-ray to determine any possible disruption of the integrity of the esophageal

wall, was carried out on August 23, following dilation. This indicated a mucosal irregularity as of a superficial tear, but disclosed no evidence of any compromise of the integrity of the wall of the esophagus.

In support of her argument that a rupture of the esophagus would be conclusively evident upon a finding of subcutaneous emphysema, plaintiff cites additional deposition testimony of the defendant. The defendant did describe subcutaneous emphysema as an accumulation of air beneath the skin. He went on to say that a very distinctive sign of a perforation of the esophagus is a so-called mediastinal emphysema, which means an accumulation of air within the tissues of the mediastinum. Signs of such a condition include the sound of a mediastinal crunch, which is detected by the use of a stethoscope; and a fair inference may be drawn from the defendant's testimony that such a procedure was carried out.

The defendant agreed that a tear in the esophagus may involve swelling in the tissues of the neck, which was not present in this case. Finally, (p. 578) according to the deposition, a superficial tear of the mucosa would not necessarily involve a weakening of the esophagal wall. But if there was a disruption of the muscle coat such that there was communication between the lumen of the esophagus and the surrounding mediastinal tissues, then it would be justified to suspect the development of a mediastinal emphysema problem. In such a case one might very well expect an infection within those tissues, and no infection was found.

The affidavit then concludes with the following recitation: "C) that Defendant failed to terminate procedures

on the 22nd and treat conservatively with antibiotics, especially Clendamycin [sic], the most powerful and least used (toxic) except in life threatening situations; *but rather waiting,* did not employ it until it was too late on August 25th, the day of major surgery to save Plaintiff's life.

"16. That experts are available and will testify, verifying the facts herein, upon being subpoenaed; the trial of this case being specially set on a day certain far enough in the future to ensure their appearance; that the Defendant by affidavit, filed January 12, 1983, has admitted that the procedures he employed are 'the generally accepted and recognized standard of care or skill of the community or similar communities in the use of the dilitation [sic] procedure'; but Defendant has not denied negligence in the use of non-dilitation [sic] procedures."

The various statements and conclusions offered by the plaintiff's counsel in his affidavit are attempts by a lay witness to interpret medical testimony and arrive at conclusions as to the possible negligence of a physician and surgeon. We adhere to the rule expressed in our former opinion, *Hanzlik v. Paustian,* 211 Neb. 322, 318 N.W.2d 712 (1982), that this must be proved by expert testimony.

We do not agree with counsel's conclusion that "Defendant has not denied negligence in the use of non-dilitation [sic] procedures." In his affidavit the (p. 579) defendant states "that based upon his personal knowledge and experience as a specialist in the practice of gastroenterology, he denies any negligence on his part in his treatment of Plaintiff." Furthermore, he stated "that he followed the generally accepted and recognized standard

of care or skill of the community or similar communities in the use of the dilitation [sic] procedure." This is the approved test for determining whether a physician was negligent in the performance of medical services. *Kortus v. Jensen,* 195 Neb. 261, 237 N.W.2d 845 (1976).

We believe that the defendant has now made a prima facie showing that he would be entitled to a judgment if the evidence were uncontroverted at trial, as required by our former opinion in *Hanzlik.* Therefore, "Summary judgment should be granted to the movant unless the opposing party offers *competent evidence* . . . that there is a genuine issue as to a material fact." (Emphasis supplied.) *Hanzlik* at 328, 318 N.W.2d at 716.

A conclusionary statement of alleged facts made by a nonexpert witness as to the care, skill, or diligence exercised by one in the treatment of a medical condition, to be verified by unidentified experts at the time of trial, does not fulfill the plaintiff's burden of establishing a genuine issue of a material fact. *Hanzlik v. Paustian, supra.*

"Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Neb. Rev. Stat. § 25-1334 (Reissue 1979).

" 'Under this provision [Fed. R. Civ. P. 56(e)], therefore, statements in affidavits as to opinion, belief, or conclusions of law are of no effect. The same is true of summaries of facts or arguments, and of statements which would be inadmissible in (p. 580) evidence * * *.' " *Eden v. Klaas,* 165 Neb. 323, 328, 85 N.W.2d 643, 646 (1975).

"An affidavit opposing the rendition of a summary judgment, to be effective, must be made on personal knowledge, must set forth such facts as would be admissible in evidence in detail and with precision, and must show affirmatively that the affiant is competent to testify to the matters stated therein." *In re Freeholders Petition,* 210 Neb. 583, 589, 316 N.W.2d 294, 298 (1982).

The judgment of the district court in granting summary judgment was correct and is affirmed.

AFFIRMED.

(3)

No. 84-80

In The

Supreme Court of the United States

October Term, 1984

VIRGINIA T. HANZLIK,

Petitioner,

vs.

FREDERICK F. PAUSTIAN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

EMIL F. SODORO
200 Century Professional Plaza
7000 Spring Street
Omaha, Nebraska 68106
(402) 397-6200

Attorney for Respondent.

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

13 pp

QUESTIONS OF LAW PRESENTED FOR REVIEW

A. WHETHER IN A MEDICAL MALPRACTICE ACTION INVOLVING KNOWLEDGE BEYOND THE GRASP OF AVERAGE JUROR, EXPERT TESTIMONY IS REQUIRED TO PROVE NEGLIGENCE OF OTHER PHYSICIANS, OR WHETHER AN AFFADAVIT FROM A LAY PERSON CAN BE SUFFICIENT TO MEET THAT REQUIREMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

No. 84-80

In The

Supreme Court of the United States

October Term, 1984

VIRGINIA T. HANZLIK,

Petitioner,

vs.

FREDERICK F. PAUSTIAN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CITATION OF THE REPORTED OPINION WHICH IS SOUGHT TO BE REVIEWED

The Respondent accepts the statement of the Petitioner for this section.

JURISDICTIONAL STATEMENT

The Respondent accepts the statement of the Petitioner for this section.

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Respondent accepts the statement of the Petitioner for this section.

———o———

STATEMENT OF THE CASE

The Respondent relies on the appendix to Petition for Writ of Certiorari for his statement of the case. The appendix to the Petition for a Writ of Certiorari contains the verbatim opinion of the Supreme Court of the State of Nebraska in its decision affirming the granting of a summary judgment for the Respondent in this case. A motion for rehearing filed by the Petitioner herein was overruled without comment on April 11, 1984 by the Supreme Court of the State of Nebraska.

———o———

SUMMARY OF ARGUMENT

1) The Decision Of The Supreme Court Of The State Of Nebraska In This Case Is Not In Conflict With Federal And State Decisions.

2) **The United States Supreme Court Has Denied Certiorari In Other Cases Petitioning On Grounds Of Violation Of Due Process Of Law.**

3) **This Case Does Not Require The Exercise Of The Supreme Court's Extraordinary Discretionary Jurisdiction And The Granting Of A Writ Of Certiorari Would Establish A Dangerous Precedent In Other Civil Cases.**

ARGUMENT

I. The Decision Of The Supreme Court Of The State Of Nebraska In This Case Is Not In Conflict With Federal And State Decisions.

The Petitioner in this case is attempting to show a violation of her right to due process under the United States Constitution because the Nebraska Supreme Court would not accept the affidavit of her lawyer interpreting some medical signs and symbols, as competent and sufficient evidence of malpractice.

The fundamental question here is whether or not the Nebraska Supreme Court was correct in requiring actual proof of medical negligence by a competent witness, as opposed to the conclusionary affidavit of a lay witness.

The requirement that expert testimony is necessary for the Plaintiff to make a prima facie case in a medical malpractice action is one which has been followed by virtually every State of the Union, and all of the Federal Appellate Courts. In Nebraska, the case of *Winters v. Rance,* 125 Neb. 577, 251 N.W. 167, held that "When case demands skill and judgment of surgeon with respect to

employment of scientific technique, negligence in treating of injury must be proved by expert witnesses." This general rule is upheld by the Nebraska Supreme Court in *Halligan v. Cotton,* 193 Neb. 331, 227 N.W. 2d 10, and *Kortus v. Jensen,* 195 Neb. 261, 237 N.W. 2d 845.

Lay testimony is simply insufficient when the procedures followed by a doctor charged with negligence are beyond the scope of knowledge of the ordinary layman. In the factual setting of this instant matter, Dr. Paustian, practicing his specialty of gastroenterology, used progressively sized dialators to alleviate a condition of a stricture in the Plaintiff's/Petitioner's esophagus. Certainly the Supreme Court of the State of Nebraska was not out of line in requiring expert testimony to prove the standards required of the treating physician, finding that this procedure is outside of the comprehension of the average juror, and correctly refusing to apply a doctrine of res ipsa loquitur.

This general principle of the necessity of expert testimony is not unique to Nebraska. Other cases across the country and federal appellate decisions fall in line behind the Nebraska court in upholding this fundamental rule of law. (See *Savage v. Christian Hospital Northwest,* 543 F.2d 44; *Speer v. U.S.,* 512 F.Supp. 670, affirmed 675 F.2d 100; *Haven v. Randolph,* 494 F.2d 1069, 161 U.S.App. D.C. 150; *Washington Hospital Center v. Butler,* 384 F.2d 331, 127 U.S.App.D.C. 379; *Pegram v. Sisco,* 406 F.Supp. 776, affirmed 547 F.2d 1172.

This Court has addressed this question in the case of *Karp v. Cooley,* 349 F.Supp. 827 (1972), heard by the

United States Court of Appeals for the Fifth Circuit and reported at 493 F.2d 408. A Petition for Writ of Certiorari was denied by the United States Supreme Court on October 15, 1974. In that case, the Court was asked to consider whether or not, among other things, the Plaintiff must produce expert medical testimony to establish a medical standard of conduct, deviation from that standard, and proximate cause. The Plaintiffs in the District Court action had attempted to introduce medical articles to establish negligence. The Court below found that they were not evidence of negligence or proximate cause, and that the establishment of a medical standard can only be proved by medical testimony.

The case which presents itself instantly to this Court for consideration on the Petition for Writ of Certiorari is similarly structured. The Plaintiff in this appeal in seeking to gain a hearing on the "due process question" merely begs the ultimate question of whether or not the established doctrine of required expert testimony is a sound one. Courts all over the Country have followed this doctrine for decades.

The law of the United States is standard on this issue. Cases are collected in the Decennial digests and State and Regional Reporters under the West keynote of "Physicians and Surgeons" 18.80 (6), and without reciting references to each of these cases, it is sufficient to say that each of them upholds this general principle and that this is a uniform rule of law governing malpractice cases in this country.

II. The United States Supreme Court Has Denied Certiorari In Other Cases Petitioning On Grounds Of Violation Of Due Process Of Law.

The case of *Karp v. Cooley*, cited above, is but one of the various due process cases passed upon by the United States Supreme Court. Certiorari was denied in that case.

The case of *Edwards v. United States*, 519 F.2d 1137 (1975), cert. den. 425 U.S. 972, 48 L.Ed.2d 795 (1976), was another medical malpractice case and the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was denied on May 19, 1976. *Edwards* stood for the proposition that state law controls the issue of liability in a medical malpractice case and that expert testimony is necessary to establish the negligence of a physician. The Plaintiff did produce certain evidence in that case, and a Dr. Liebendorfer went so far in his testimony for the Plaintiffs to say that he believed that the Defendant physicians committed a mistake in judgment. The Court found that that does not establish a professional standard of care and a deviation from that standard. On that ground, the Court dismissed the case, and subsequent appeals through the Fifth Circuit and on Petition for a Writ of Certiorari to the Supreme Court, met with the same fate.

The claim of due process was made, and Petitions for Writs of Certiorari were denied in the cases of *State v. O'Kelley*, 124 N.W.2d 211, *Rhodes v. Edwards*, 382 U.S. 943, 135 N.W.2d 453, *State v. Jensen*, 105 N.W.2d 459 and *Presbytery of Southeast Iowa v. Harris*, 226 N.W.2d 232.

III. This Case Does Not Require The Exercise Of The Supreme Court's Extraordinary Discretionary Jurisdiction And The Granting Of A Writ Of Certiorari Would Establish A Dangerous Precedent In Other Civil Cases.

Anyone may assert the grounds of denial of due process as a stepping stone for an appeal to the United States Supreme Court. If the Court herein grants the Writ of Certiorari requested, it would simply open a flood-gate of further litigation on the tenuous grounds asserted by the Petitioner herein.

The Petitioner should not be allowed to frame his issues under the guise of "due process of law", when the real issue is one of substantive state law, followed universally across country: Medical malpractice actions demand expert medical testimony.

To permit an Affidavit from a lay person interpreting some signs and symbols from an unknown source in a manner unknown to anyone except the Affiant, is tantamount to allowing proof of any issue by any person regardless of his or her competency. It is not an unfair requirement that expert testimony is demanded in a medical malpractice case. As the cases above indicate, such issues are generally within the scope only of experts' knowledge, and demand an interpretation for lay jurors.

The granting of a Writ of Certiorari in this case would merely open the flood-gates for thousands of other cases based on nothing more than a conclusionary statement from an attorney representing one of the parties.

———o———

CONCLUSION

This case should not be heard by the United States Supreme Court. The general principles of this case have been heard in every state court, in every United States District Court, in every Court of Appeals throughout the land, and the questions have even been presented to the United States Supreme Court. A universal rule has emerged, and it is a standard of law which is followed uniformly throughout the Country.

The granting of a Writ of Certiorari would fly in the face of these prior well-reasoned decisions of appellate courts, would reverse prior holding of this Court, and would lay the groundwork for a never-ending stream of appeals on the basis of nothing more than an Affidavit based on whatever facts and conclusions an attorney wishes to make. This is clearly not the law now, nor should it be in the future.

Respectfully submitted,

EMIL F. SODORO
200 Century Professional Plaza
7000 Spring Street
Omaha, Nebraska 68106
(402) 397-6200

Attorney for Respondent.

84-80

No. _____

In The

Supreme Court of the United States

October Term, 1983

VIRGINIA T. HANZLIK,
Petitioner,

vs.

FREDERICK F. PAUSTIAN,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

ADDENDUM TO APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

*David L. Herzog
1400 First National Center
Omaha, Nebraska 68102
(402) 341-5311

Jon B. Abbott
Suite 410 Keeline Building
619 South 17th Street
Omaha, Nebraska 68102
(402) 346-0550

Attorney for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

APP

ORDER DENYING MOTION FOR REHEARING

By Order of the Court, Motion of Appellant for Rehearing, Denied.

DATED this 11 day of April, 1984.

BY THE COURT

(SEAL)

SUPREME COURT)
) ss.
STATE OF NEBRASKA)

I certify that I have compared the foregoing copy of the motion for rehearing denial Order dated 4/11/84 in the following case: Hanzlik vs. Paustian, # 83-295 with the original now on file in my office. The same is a correct copy of the original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Seal of this Court, in the City of Lincoln, on August 23, 1984

(date)

Kenneth A. Wade

Acting Deputy Clerk

By /s/ Kenneth A. Wade

Deputy Clerk

(SEAL)